

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION,

Plaintiff,

v.

DEPARTMENT OF HEALTH AND HUMAN
SERVICES,

Defendant.

Civil Action No.

COMPLAINT FOR INJUNCTIVE RELIEF

Preliminary Statement

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for injunctive and other appropriate relief. Plaintiff the American Civil Liberties Union (the “ACLU”) seeks the immediate processing and timely release of all documents related to the federal government’s recent and ongoing changes to the nation’s Title X family planning program, *see* 42 U.S.C. § 300 *et seq.*, which threaten to completely upend a vital safety-net program and generate serious public health harms, endangering the health and wellbeing of the millions of people who rely on the program each year.

2. On October 25, 2018, the ACLU requested documents under the FOIA from the U.S. Department of Health & Human Services (“HHS”) regarding changes to the Title X family planning program since November 9, 2016, including but not limited to the Notice of Proposed Rulemaking (“NPRM”) published on June 1, 2018, titled, “Compliance with Statutory Program Integrity Requirements,” (RIN 0937-ZA00, Dkt. No. HHS-OS-2018-0008).¹ The ACLU also

¹ A copy of the request is attached hereto as Exhibit A (hereinafter, “Ex. A”).

sought expedited processing of the request, and a waiver of any search, review, and duplication fees over \$500.00. *See* Ex. A at 1, 3. On October 29, 2018, the ACLU received a response from HHS officially acknowledging receipt of the October 25, 2018 request, designating it as “Request Number 2019-00162-FOIA-OS,” and explaining that the request was being referred to the HHS Program Support Center for direct response.²

3. Although the ACLU submitted Request 2019-00162-FOIA-OS over ninety-five days ago, to date the ACLU has received no responsive records. The ACLU has received only the above-cited October 29, 2018 acknowledgment letter, *see* Ex. B, and a January 24, 2019 email in reply to the ACLU’s follow-up inquiry checking on the status of the request.³ In that reply, HHS said the process is “slow” and that there is a backlog of cases. *See* Ex. E. The ACLU further asked when it could expect to receive documents, *see id.*, but HHS did not respond.

4. Defendant has thus far exceeded the statutory and regulatory time limitations to respond. *See* 5 U.S.C. § 552(a)(3)(A); *id.* § 552(a)(6)(A)(i); *id.* § 552(a)(6)(E)(ii)(I). Defendant’s failure to process and release the requested documents is of particular concern given that the documents sought relate to HHS’s highly controversial proposed changes to the Title X program, a topic of intense and ongoing public debate. It is crucial that the requested documents are disclosed so that there is complete transparency in HHS’s process of attempting to change the nation’s only dedicated family planning program.

5. Accordingly, the ACLU respectfully requests that this Court issue an order requiring Defendant to process the ACLU’s request immediately and to produce the responsive records and enjoining the Defendant from assessing fees for the processing of the request.

² A copy of this acknowledgment is attached hereto as Exhibit B (hereinafter, “Ex. B”).

³ A copy of the ACLU’s follow-up letter is attached hereto as Exhibit D (hereinafter, “Ex. D”). A copy of HHS’s January 24, 2019 email response is attached hereto as Exhibit E (hereinafter, “Ex. E”).

Jurisdiction and Venue

6. This Court has subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. §§ 552(a)(4)(B), (a)(4)(A)(vii), (a)(6)(E)(iii). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331, and 5 U.S.C. §§ 701–706.

7. Venue is proper in this District under 5 U.S.C. § 552(a)(4)(B) because Plaintiff's principal place of business is in New York.

Parties

8. Plaintiff the American Civil Liberties Union is a nationwide, non-profit, nonpartisan organization with more than 1.5 million members and donors dedicated to the constitutional principles of liberty and equality. The ACLU is committed to ensuring that the United States government complies with both the Constitution and the laws in matters that affect civil liberties and human rights, to upholding the principles of government transparency and public accountability, and to educating the public about the conduct of government as it pertains to civil liberties and rights. The ACLU employs lawyers who provide legal representation free of charge in cases involving civil liberties, and has filed multiple FOIA requests pertaining to the government's policies.

9. Defendant U.S. Department of Health & Human Services is a Department of the Executive Branch of the United States government. HHS is an agency within the meaning of 5 U.S.C. § 552(f)(1).

Factual Background

The Title X Program and HHS's NPRM

10. The Title X program has served as the country's sole dedicated source of federal funding for comprehensive family planning and related preventative health services for over

forty-five years. Using Title X grants, a robust and diverse national network operates family planning projects that offer a broad range of critical health services, including a variety of contraceptive methods and devices, testing and counseling services, and full, accurate medical information, to Title X patients, the vast majority of whom live below, at, or near the federal poverty line. Provision of this high quality, clinical family planning care is intended to assist and empower patients (regardless of income) to make voluntary, informed decisions about their health and, in so doing, to take control of their reproductive lives. Since its creation in 1970, the Title X program has served as a vital component of the U.S. health care system and has been a documented public health success, including by the Centers for Disease Control & Prevention—not only does it save billions in health care costs annually, it also preserves and protects the health and well-being of the approximately four million patients who depend on it each year.

11. Despite the long, ongoing success of the Title X program, on June 1, 2018 Defendant HHS published an NPRM for the Title X family planning program, proposing a multitude of additions and amendments to the long-standing, effective Title X regulations. The NPRM builds on earlier rounds of changes attempted through the 2018 and 2019 funding opportunity announcements (“FOAs”) for the Title X grant competitions. These expanding changes, if allowed to govern, will fundamentally undermine the Title X program’s intended purpose of ensuring that low-income individuals have access to comprehensive, non-directive information about their family planning options, and will seriously harm the public health.

12. Indeed, if adopted, the proposed changes will, among other things, bar Title X providers from conducting neutral counseling about a person’s options about her pregnancy, and require that such providers withhold information about abortion. The rules also purport to require unnecessary and unworkable physical separation between the Title X project and providers’

other activities that might include abortion care or the provision of abortion information. The effect of these proposed changes will be to radically change the makeup of the Title X network by driving out the most experienced and highest quality providers of family planning care and encouraging entities opposed to offering the full range of effective and acceptable family planning methods to join the program in their place.

13. If these regulations are adopted and take effect, patients who would otherwise have obtained non-judgmental, quality clinical care through the Title X program will lose access to effective Title X-funded family planning and, as a result, will experience higher rates of unintended pregnancy and infertility, sexually transmitted infections (including HIV), and undetected cancers, and decreased control over the timing and spacing of children.

The FOIA Request and HHS's Response

14. Given the seriousness of HHS's recent and ongoing changes and the intensity of the public controversy surrounding them, on October 25, 2018, the ACLU filed a FOIA request with Defendant HHS, seeking the release of all materials related to HHS's changes to the Title X family planning program, including the proposed "Compliance with Statutory Program Integrity Requirements" rule, since November 9, 2016. *See* Ex. A at 2.

15. The ACLU specified that this request included, but was not limited to: "(1) All communications, memoranda, notes, guidelines, bulletins in HHS, including any sub-agencies; (2) All communications between HHS and any other federal agency; (3) All communications between HHS and any elected or appointed state or federal official, including prior to their election or appointment; (4) All communications between HHS and any non-governmental party, including but not limited to non-profit advocacy organizations such as Susan B. Anthony's List, Alliance Defending Freedom, Becket, American Association of Pro-Life OBGYNs." *Id.* at 2.

16. The ACLU also requested expedited processing of this request, on the basis that there is a “compelling need” for the requested records because the information requested is “urgently needed” by the ACLU—an organization “primarily engaged in disseminating information,” *id.* at 1—to “inform the public [about] actual or alleged Federal Government activity.” *Id.* at 6; *see* 5 U.S.C. § 552(a)(6)(E); 45 C.F.R. § 5.27(b)(2). As the ACLU explained, the requested records relate to the radical changes that HHS has introduced and is proposing to inflict on the nation’s sole dedicated family planning program, which are the subject of widespread public controversy and media attention,⁴ and are necessary to ensure government transparency in the rulemaking process.

17. The ACLU also sought a waiver of search, review, and duplication fees over \$500.00, on the basis that disclosure of the requested records is “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” *See* 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 45 C.F.R. § 5.54. Because the ACLU requested that HHS respond “as quickly as possible” to its request, and did not wish to slow down the agency’s response, it did not request a waiver of fees less than \$500.00 at that time. *See* Ex. A at 3.

⁴ *See, e.g.,* Julie Hirschfeld Davis, *How New Abortion Restrictions Would Affect Women’s Health Care*, N.Y. Times (May 18, 2018) <https://www.nytimes.com/2018/05/18/us/politics/trump-abortion.html>; Ariana Eunjung Cha, *States defend family planning program against Trump administration’s threats*, Wash. Post (July 31, 2018), <https://www.washingtonpost.com/news/to-your-health/wp/2018/07/31/states-voice-opposition-to-trump-administrations-proposed-change-to-federal-family-planning-program>; Laura Santhanam, *Trump’s proposed changes to Title X could limit access to abortion*, PBS News Hour (July 31, 2018), <https://www.pbs.org/newshour/health/trumps-proposed-changes-to-title-x-could-limit-access-to-abortion>; Olga Khazan, *More Than a Gag Rule*, The Atlantic (June 4, 2018), <https://www.theatlantic.com/health/archive/2018/06/texas-trump-title-x/561905>; Vivek H. Murthy & Alice T. Chen, *Trump administration plan means fewer Americans will have access to family planning*, USA Today (June 6, 2018), <https://www.usatoday.com/story/opinion/2018/06/06/donald-trump-title-x-changes-birth-control-abortion-contraception-column/672801002>.

18. On October 29, 2018, HHS officially acknowledged receipt of the October 25, 2018 request, designating it Request Number 2019-00162-FOIA-OS, and explained that the request was being referred to the HHS Program Support Center for direct response. *See* Ex. B.

19. Apart from this initial acknowledgment, the ACLU received no formal follow-up response from Defendant regarding the status of Request 2019-00162-FOIA-OS, and none of the documents requested. Rather, the status of the ACLU's Request 2019-00162-FOIA-OS has been recorded as "Closed" on the FOIA website.⁵

20. On January 14, 2019, the ACLU sent a follow-up letter, via email and regular mail, to HHS, inquiring as to the status of Request 2019-00162-FOIA-OS, and noting that a total of fifty-three working days had elapsed since the request was initially received by HHS and the ACLU had yet to receive any direct response. *See* Ex. D.

21. On January 24, 2019, HHS responded via email to the ACLU's January 14, 2019 inquiry, referencing a different request number than the one HHS had assigned to the ACLU's request on October 29, 2018, and maintaining that it has a "backlog of cases that are requesting email records," is "still waiting on the records search," and that the search process is a "slow" one. *See* Ex. E.

22. That same day, the ACLU responded, reminding HHS that the statutory deadline had passed, and inquiring as to when the ACLU could expect to begin receiving responsive documents and why the status of Request 2019-00162-FOIA-OS has been marked as "Closed" online. *Id.*

23. To date, the ACLU has received no further response from HHS.

⁵ A screenshot of the status of the ACLU's request, as it appears on the FOIA website, is attached hereto as Exhibit C (hereinafter, "Ex. C").

24. Under the FOIA, an agency must determine whether to comply with the request within twenty days (excluding weekends and legal holidays) after receiving it. *See* 5 U.S.C. § 552(a)(6)(A)(i). If the requestor seeks expedited processing and demonstrates compelling need for the documents, as the ACLU did in this case, that time is shortened to ten days after the date of the request. *Id.* § 552(a)(6)(E)(ii)(I); 45 C.F.R. § 5.27(c) (“We will respond to your request for expedited processing within 10 calendar days of our receipt of your request to expedite.”).

25. Plaintiff has exhausted all administrative remedies because HHS has failed to comply with the time limits imposed by the FOIA statute and the applicable HHS regulations. *See* 5 U.S.C. § 552 (a)(6)(C)(i).

26. HHS continues to unlawfully withhold the requested records from Plaintiff.

27. The ACLU has therefore instituted this action to ask the Court to order HHS to disclose the requested documents.

The ACLU’s Entitlement to a Waiver of or Reduced Processing Fees

28. In its October 25, 2018 request, the ACLU sought a waiver of document search, review, and duplication fees in the event they exceed \$500.00. *See* Ex. A at 3. At the time, the ACLU’s cabining of its waiver request as such (*i.e.*, its decision not to request that any and all fees be waived) was intended to ensure that Defendant was able to respond to the request as quickly as possible. *See id.*

29. Given that over three months have elapsed since the ACLU submitted its initial request and Defendant has not provided the ACLU with *any* of the requested documents, the ACLU now requests that all document search, duplication, and review fees be waived pursuant to the FOIA and federal regulations. *See* 5 U.S.C. § 552(a)(4)(A)(ii), (iii); 45 C.F.R. § 5.53(d)(1) (“If we fail to comply with the FOIA’s time limits in which to respond to a request, we may not

charge search fees, or, in the instances of the requester categories referenced in paragraph (b) of this section, [an educational or noncommercial scientific institution requester, or member of the news media], may not charge duplication fees, except as described in (d)(2)-(4).”).

30. Pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)-(iii) and 45 C.F.R. § 5.54, fees should be waived or reduced if disclosure is (1) in the public interest because it is “likely to contribute significantly to public understanding of the operations or activities of the government” and (2) “not primarily in the commercial interest of the requester.” Disclosure in this case meets both of these tests; and a fee waiver would fulfill Congress’s legislative intent in amending FOIA. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’” (quoting *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987))).

31. *First*, disclosure pursuant to this request is in the public interest. The requested records pertain directly to the operations and activities of the federal government; the information to be learned from the requested documents is not already public knowledge; and disclosure will contribute to the public good in a significant way because the requested records are all materials related to ensuring transparency in a federal agency’s process of attempting to remake the nation’s oldest family planning program. This certainly “contribute(s) to the public’s understanding of the agenc[y’s] operations.” *Judicial Watch*, 326 F.3d at 1313 (quoting 5 U.S.C. § 552(a)(4)(A)(iii)).

32. *Second*, disclosure is not in the ACLU’s commercial interest. The ACLU is a “non-profit, non-partisan, public interest organization.” *See Judicial Watch*, 326 F.3d at 1310 (citation omitted). Additionally, the purpose of the request is to monitor and vindicate legal rights; it is

unrelated to business, trade, or profit. The ACLU will evaluate the disclosed documents and, depending on what they contain, may well disseminate the information to the public. If the ACLU publicly discloses information obtained through the FOIA, it will do so at no cost to the public.

33. Accordingly, the requested documents should be “furnished without any charge or at a charge reduced below the fees established” to be reasonable standard charges for document duplication, 5 U.S.C. § 552(a)(4)(A)(iii), or, at the very least, any fees should be “limited to reasonable standard charges for document duplication,” *id.* § 552(a)(4)(A)(ii)(II).

Causes of Action

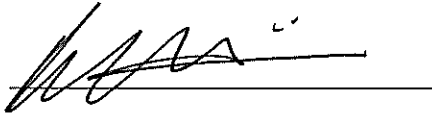
1. The ACLU repeats and re-alleges paragraphs 1–33.
2. Defendant’s failure to process the ACLU’s request expeditiously and as soon as practicable violates the FOIA, 5 U.S.C. § 552(a)(6)(E)(ii)(I), and Defendant’s corresponding regulations.
3. Defendant’s failure to respond in a timely manner to the ACLU’s request violates the FOIA, 5 U.S.C. § 552(a)(6)(A)(i), and Defendant’s corresponding regulations.
4. Defendant’s failure to make a reasonable effort to search for records responsive to the ACLU’s request violates the FOIA, 5 U.S.C. § 552(a)(3)(C), and Defendant’s corresponding regulations.
5. Defendant’s failure to promptly make available the records sought by the request violates the FOIA, 5 U.S.C. § 552(a)(3)(A) , (6)(A), and Defendant’s corresponding regulations.
6. Defendant’s failure to grant Plaintiff’s request for a waiver of search, review, and duplication fees violates the FOIA, 5 U.S.C. § 552(a)(4), (a)(6), and Defendant’s corresponding regulations.

Requested Relief

WHEREFORE, Plaintiff respectfully requests that this Court:

1. Order Defendant to immediately conduct a thorough search for all responsive records;
2. Order Defendant to immediately process and release any responsive records in their entirety and make copies available to Plaintiff;
3. Enjoin Defendant from charging Plaintiff search, review, or duplication fees for the processing of its request;
4. Award Plaintiff its costs and reasonable attorneys' fees incurred in this action under 5 U.S.C. § 552(a)(4)(E)(i); and
5. Grant such other relief as the Court may deem just and proper.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Brigitte Amiri', is written over a horizontal line.

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